

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

FAUSTINO GOMEZ,

Defendant.

NO. CR-11-6004-LRS

**ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER AND
DEFENDANT'S MOTION TO DISMISS**

BEFORE THE COURT, at the scheduled motion hearing on April 20, 2011 in Yakima, is Defendant's Motion to Reconsider Motion to Dismiss, Ct. Rec. 39, filed March 23, 2011. The Court denied Defendant's Motion to Dismiss, Ct. Rec. 28, on March 15, 2011 in its Order Denying Defendant's Motion to Dismiss and Excluding Speedy Trial Act Time. Ct. Rec. 37. Assistant United States Attorney Alexander Ekstrom appeared on behalf of the Government; Alison Guernsey appeared on behalf of Defendant Gomez.

After considering the arguments of the parties, the court indicated Defendant's Motion to Reconsider would be taken under advisement.

A. BACKGROUND FACTS

On July 31, 2001, the Defendant, Faustino Gomez, was ordered deported.¹ The Defendant waived appeal of the IJ Order. *Id.* The

¹ Ct. Rec. 33, Attachment A (Order of the Immigration Judge, dated July 31, 2001).

1 Defendant was deported from Paso Del Norte.² The Defendant illegally
2 returned to the United States. On January 17, 2006, the Defendant was
3 served with a Notice to Appear which was written in English only,
4 alleging that he was an alien present in the United States without having
5 been properly admitted, and additionally alleging that he had committed
6 a crime of moral turpitude.³

7
8 The Defendant waived his right to have a 10-day period prior to
9 appearing before an immigration judge, and requested an immediate
10 hearing.⁴ On January 19, 2006, the Defendant was served with a Notice to
11 Appear that was written in English only, alleging that he was an alien
12 present in the United States without having been properly admitted, but
13 without the additional allegation of a crime of moral turpitude.⁵ The
14 Defendant again waived his right to have a 10-day period prior to
15 appearing before an immigration judge, and requested an immediate
16 hearing.⁶ That same day, January 19, 2006, rather than contest his
17 deportability, the Defendant conceded the issue in a four-page waiver of
18 ///

19 ///

21 ²Ct. Rec. 33, Attachment B (Form I-205, Warrant of
22 Removal/Deportation.

23 ³(Ct. Rec. 29-1) (Exhibit A) (Form I-862, dated January 17, 2006).

24 ⁴Id.

25 ⁵(Ct. Rec. 29-1) (Exhibit B) (Form I-862, dated January 19, 2006).

26 ⁶ Id.

1 hearing.⁷ In this form, he acknowledged, among other rights, his right
2 to a hearing and his right to seek relief from deportation, but indicated
3 that he was giving up these rights and wished to be immediately returned
4 to his country of citizenship, Mexico.⁸ The form was presented in both
5 English and Spanish. Defendant Gomez was ordered deported, without
6 appearing before an IJ, based on his admissions and waiver.⁹ The
7 Defendant waived appeal of the IJ Order.¹⁰ Defendant was deported on the
8 day the order was signed.¹¹ On January 11, 2011, the Defendant was
9 charged in this district with being an Alien in the United States After
10 Deportation, under 8 U.S.C. § 1326.

11
12 **B. Gomez's Argument Re: Invalid Waivers**

13 Defendant Gomez requests that this Court reconsider his motion to
14 dismiss the indictment, and consider his new Affidavit signed March 22,
15 2011 ("new Affidavit"), in support of his motion for reconsideration.

16
17 ⁷(Ct. Rec. 29-1) (Exhibit C) (Respondent's Stipulated Request For
18 Order; Waiver Of Hearing Pursuant To 8 CFR 3.25(b), dated January 19,
19 2006).

20 ⁸Id.

21 ⁹(Ct. Rec. 29-1) (Exhibit D) (Order of the Immigration Judge, dated
22 January 20, 2006).

23 ¹⁰Id.

24 ¹¹(Ct. Rec.
25 29-1) (Exhibit E) (Form I-205, Warrant of Removal/Deportation, executed
26 January 20, 2006).

1 Defendant argues that his 2006 removal from the United States via a
2 stipulated order of removal violated his right to due process of law
3 because he never validly waived his right to appear before an Immigration
4 Judge ("IJ") and apply for relief from removal. Defendant asserts that
5 he was unrepresented at the time of the removal proceedings. He also
6 argues that the Immigration Judge was required to inquire if he desired
7 to have counsel despite his written waiver of his right to counsel and
8 whether his signed waiver was voluntary, knowing, and intelligent
9 pursuant to 8 C.F.R. § 3.25(b) (now 8 C.F.R. § 1003.25).

10
11 In Defendant's new Affidavit (Ct. Rec. 40-1, Exh. J), submitted
12 after the Court ruled on his motion to dismiss and over the objection of
13 the Government,¹² Defendant advises that although he attended school
14 through the 6th grade in his home country of Mexico, his reading
15 comprehension skills are below an equivalent 6th grade education level in
16 the United States. Defendant states although he learned how to read and
17 recognize words, he has trouble understanding what he has read. In his
18 new Affidavit, however, Defendant states that he never read the form that
19 the immigration officer read to him.¹³ Defendant argues that he was
20

21 ¹²The Government provided no authority to preclude the Court from
22 considering the supplemental facts set forth in the new Affidavit.

23 ¹³The Notice To Respondent erroneously dated 1/17/05 rather than
24 1/17/06 (Ct. Rec. 29-1) specifically recited that it had been read to the
25 defendant in Spanish. The document was signed by the special agent
26 handling the defendant's deportation.

1 denied the right to retain counsel and the IJ in his case never addressed
2 his waiver of the right to counsel. Further, Defendant asserts the IJ
3 never engaged in a colloquy, which he/she is required to do since he was
4 unrepresented, to determine if his waivers were voluntary, knowing, and
5 intelligent.

6 In his new Affidavit, Defendant additionally states he does not
7 remember having the form in his hands while it was being read to him and
8 many others held in the cell with him. Defendant also states that the
9 immigration officer told him that if he signed the form, he could be
10 immediately deported. Ct. Rec. 40-1. Defendant states that the entire
11 process lasted less than forty-five minutes. Defendant states he did not
12 speak to an attorney, and nobody explained his rights during the process,
13 i.e., right to voluntary departure, right to appeal, right to counsel.
14 Defendant concludes if he had understood the rights that he was giving
15 up by signing the form, and eligibility for voluntary departure at a
16 removal hearing, he would not have given up his right to appear before
17 an IJ. Defendant states he was prejudiced by the due process violation
18 because he was in fact eligible for voluntary departure.
19

20 **C. Analysis**

21 Under 8 U.S.C. § 1326(a), an alien is criminally liable if he is
22 found in the United States after he "has been denied admission, excluded,
23 deported, or removed," without consent of the Attorney General or other
24 advance consent. "In a criminal prosecution under § 1326, the Due Process
25 Clause of the Fifth Amendment requires a meaningful opportunity for
26

1 judicial review of the underlying deportation." *United States v. Zara*
2 *te-Martinez*, 133 F.3d 1194, 1197 (9th Cir.1998), *overruled on other*
3 *grounds by United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir.2002)
4 (en banc). If the district court finds that "(1)[the defendant's] due
5 process rights were violated by defects in his underlying deportation
6 proceeding, and (2) he suffered prejudice as a result of the defects,"
7 the deportation stemming from the defective proceedings may not be used
8 to prove the defendant violated § 1326. *United States v. Ramos*, 623 F.3d
9 672, 680 (9th Cir.2010) (quoting *United States v. Palares-Galan*, 359 F.3d
10 1088, 1095 (9th Cir.2004)); *see generally United States v. Mendoza-Lopez*,
11 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987).

12
13 Defendant Gomez moves the Court to dismiss the § 1326 charge against
14 him because the deportation relied upon in the Indictment violated his
15 due process rights. Mr. Gomez argues first, that he was denied due
16 process during the 2006 deportation proceedings because the IJ did not
17 make a pre-removal finding that he voluntarily, knowingly, and
18 intelligently waived his right to a hearing, right to counsel, and right
19 to appeal; and second, that he was prejudiced by this due-process denial
20 because it prevented him from seeking voluntary departure.

21
22 The Government disputes that the underlying deportation proceedings
23 were defective and argues that Mr. Gomez has not demonstrated prejudice.
24 Defendant, on the other hand, argues, citing *Rivera-Cuartas v. Holder*,
25 605 F.3d 699 (9th Cir.2010), that he could have requested voluntary
26 departure because Mr. Gomez's Arizona conviction for Second Degree

1 Attempted Sexual Conduct with a Minor Under the Age of 15 in violation
2 of ARS 13-1405 does not meet the generic definition of sexual abuse of
3 a minor such that it amounts to an aggravated felony.

4 The question raised by the defendant's Motion to Dismiss is whether
5 *Ramos, supra*, requires the IJ to have an oral colloquy with the defendant
6 before the judge can conclude that the defendant's waiver of counsel is
7 "knowing and voluntary." Defendant states in support of his motion for
8 reconsideration that no one, including the IJ, inquired about his desire
9 to have counsel, in direct contradiction to paragraphs 3 and 4 of the
10 "Stipulated Request For Removal Order and Waiver of Hearing," where Mr.
11 Gomez certifies that all the information he has given in the stipulated
12 request is true and correct, including the following information given
13 in Spanish and English:
14

15 3. I have also received a Legal Aid Services list.

16 *Tambien he recibido una lista de Servicios de Asistencia Legal.*

17 4. I have been advised of my right to be represented by an
18 attorney of my choice, at my own expense, during these proceedings.
19 I waive this right. I will represent myself in these proceedings.
20 *Se me ha informado sobre mi derecho de ser representado por un*
abogado de mi eleccion a costa propio, durante estos
procedimientos. Yo renuncio voluntariamente este derecho. Yo me
representare a mi mismo en estos procedimientos.

21 Ct. Rec. 29-1, Exh. C.

22 The Ninth Circuit explained in *Ramos*:

23 "Although there is no Sixth Amendment right to
24 counsel in an immigration hearing, Congress has
25 recognized it among the rights stemming from the
26 Fifth Amendment guarantee of due process that adhere
to individuals that are the subject of removal
proceedings." *Tawadrus v. Ashcroft*, 364 F.3d 1099,

1103 (9th Cir.2004). " 'Although IJs may not be required to undertake Herculean efforts to afford the right to counsel, at a minimum they must [(1)] inquire whether the petitioner wishes counsel, [(2)] determine a reasonable period for obtaining counsel, and [(3)] assess whether any waiver of counsel is knowing and voluntary.' " *Ram v. Mukasey*, 529 F.3d 1238, 1241-42 (9th Cir.2008) (alterations in original) (*quoting Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir.2005)).

Ramos, 623 F.3d at 682.

Of significance, the Court in *Ramos* did not invalidate 8 C.F.R. § 1003.25 which permits removal without the necessity of the parties appearing before the immigration judge. The question raised by defendant's Motion to Dismiss is whether *Ramos* requires the IJ to have an oral colloquy with the defendant in all cases before the immigration judge can conclude that his waiver of counsel is knowing and voluntary.

As noted previously, the facts in *Ramos* involved independent evidence of a problem with the Spanish translation that was utilized as part of the deportation proceeding. In the current case, the defendant's affidavits directly attack a waiver document written in his native language which he had the opportunity to read and, insofar as known, did not question before signing in 2006 after the contents were explained to him in his native language. Given his level of education as appears in the record and the fact that the requirements of 8 C.F.R. § 1003.25 were not invalidated by the 9th Circuit, the defendant's Motion to Reconsider is respectfully DENIED.

IT IS HEREBY ORDERED:

1. Defendant's Motion to Reconsider, **Ct. Rec. 39**, is **DENIED**.

